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NO. 89-1174

In the Supreme Court of the United States

OCTOBER TERM, 1989

RICHARD HIRSCH, AS TESTAMENTARY EXECUTOR OF THE SUCCESSION OF JEANNE GODCHAUX, WIDOW OF ARIEL B. NEWMAN, JR., ET AL,
Petitioner,

versus

CITY OF NEW ORLEANS AND PAUL MITCHELL, DIRECTOR OF FINANCE, CITY OF NEW ORLEANS,,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Respondents, pursuant to Rule 34.2 of this Court, accepts Petitioner's statement of the Questions Presented for Review, while continuing to deny that these questions are worthy of a grant of the writ of certiorari.

LIST OF PARTIES

Pursuant to Rule 34.2 of this Court, the City accepts Petitioner's statement of the List of Parties Seeking Review as to those parties represented by Counsel of Record for Petitioner and by Counsel for Petitioner. The City objects to the inclusion in Petitioner's List of Parties of those parties in the state court proceedings who have not joined in the petition for writ of certiorari.

In addition, Respondents the City of New Orleans and Paul Mitchell, the Director of Finance of the City of New Orleans, were "parties to the proceeding in the court whose judgment is sought to be reviewed", see Supreme Court Rule 34.1(b), but were not listed in Petitioner's List of Parties.

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INTRODUCTION

Respondents, the City of New Orleans and Paul Mitchell, the Director of Finance of the City of New Orleans, hereafter referred to as "the City", respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Louisiana Supreme Court's opinion in this case. That opinion, *Hildebrand v. City of New Orleans*, is reported at 549 So.2d 1218 (La. 1989).

JURISDICTION

The City accepts the statement of jurisdiction as set forth in the petition, except to note that Petitioner apparently seeks to invoke this Court's jurisdiction under 28 U.S.C. §1257(a); Petitioner's reference to the now-repealed subsection (3) of 28 U.S.C. §1257 (see p. 2 of petition) is in error.

STATEMENT OF FACTS

Because this case was decided on cross-motions for summary judgment, there is no need for a detailed statement of facts. Those facts which are relevant to this case are set forth in the opinion of the Louisiana Supreme Court and may be found at pages 8 - 10 of the Appendix to the petition.

OPINIONS BELOW

The opinion of the Louisiana Supreme Court and the denial of rehearing by that court in this case are set forth in pages 1 - 52 of the Appendix to the petition; the order of the trial court and that court's reasons for the ruling are set forth in pages 76 - 96 of the Appendix to the petition.

SUMMARY OF REASONS WHY THE PETITION SHOULD BE DENIED

1. No "special and important" reasons for granting certiorari have been shown.

2. The City's inheritance tax has been repealed.

3. The judgment of the Louisiana Supreme Court is based on adequate and independent state law grounds.

4. The judgment of the Louisiana Supreme Court was correct.

REASONS WHY THE PETITION SHOULD BE DENIED

I

THERE ARE NO "SPECIAL AND IMPORTANT REASONS" FOR GRANTING THE PETITION

Rule 17.1 of the Rules of the Supreme Court of the United States provides that "A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be *granted only when there are special and important reasons therefor.*" (emphasis added)

This court has stated that "special and important reasons" "imply a reach to a problem beyond the academic or episodic." *Rice v. Sioux City Memorial Park Cemetary, Inc.*, 349 U.S. 70, 74 (1955). A review of the record leaves no doubt that the petition fails to meet this threshhold test -- Petitioners have presented no special or important reasons for this court to grant certiorari.

It has been said that:

"The heart of the petition [for certiorari] is the section setting out the reasons for granting review. It should answer the two questions that are asked of all petitioners:

1) Does the decision of the court below create an intolerable conflict among the nation's lower courts?

2) Did the court below commit an error so important that it must be corrected immediately?

Both questions should be answered in every brief seeking Supreme Court review." Baker, *A Practical Guide to Certiorari*, 33 Cath.U.L.Rev. 611, 616-17 (1986). As set forth herein, one may search the certiorari petition in vain for any affirmative response to either of these questions.

A review of the petition shows that Petitioner has made no effort to demonstrate the existence of "special and important reasons" such as would justify a grant of certiorari. Instead, Petitioner raises each issue, discusses why the Louisiana Supreme Court allegedly incorrectly decided each issue under Louisiana law, and then adds a conclusory paragraph that petitioner's rights under the federal constitution have been violated.

"The appellant's objection to the State Supreme Court's application of state law does not raise a federal question appropriate for review by this Court." *Agins v. City of Tiburon*, 447 U.S. 255, 260 nt. 6 (1980).

II

THE CITY'S INHERITANCE TAX HAS BEEN REPEALED

As Petitioner notes, the Council of the City of New Orleans by unanimous vote on November 2, 1989, repealed the City's inheritance tax. (see Appendix to petition, p. 74 - 75). The repeal ordinance was signed into law by the Mayor of the City of New Orleans on November 6, 1989.

An ordinance is currently pending in the City Council which would call for a vote of the citizens of the City of New Orleans on a City Charter amendment which would prohibit the City from reenacting an inheritance tax; additionally, a bill has been proposed for the upcoming session of the Louisiana Legislature which would prohibit Louisiana parishes and municipalities from imposing an inheritance tax.

While the repeal of the tax does not automatically render this case moot, it clearly establishes yet another reason why this court should decline to grant certiorari. See *District of Columbia v. Sweeney,* 310 U.S. 631 (1940) (certiorari denied "in view of the fact that the tax is laid under a statute which has been repealed and the question is therefore not of public importance.")

The repeal of the tax has clearly left the petition only "academic or episodic" questions with which this court need not concern itself. *Rice,* supra, 349 U.S. at 74.

III

THE JUDGMENT OF THE LOUISIANA SUPREME COURT WAS BASED ON ADEQUATE AND INDEPENDENT STATE GROUNDS

This court may not review the decision of a state's highest court if that decision is "clearly and expressly . . . based on bona fide separate, adequate and independent [state law] grounds." *Michigan v. Long,* 463 U.S. 1032, 1041 (1983). See also *Caldwell v. Mississippi,* 472 U.S. 320, 327 (1981) ("plain statement" of adequate and independent state law grounds required.); *International Longshoreman's Ass'n. v. Davis,* 476 U.S. 380, 387 (1986) ("We have no authority to review state determinations of purely state law.")

The City's power to levy an inheritance tax is quintessentially a question of state law, as the validity of the tax depends on review of the 1954 Home Rule Charter of the City of New Orleans, Act 159 of the 1912 Louisiana Legislature (the predecessor to the Home Rule Charter), and various provisions of the current (1974) Louisiana Constitution, the Louisiana Constitution of 1921, the Civil Code of Louisiana, and cases from the state courts of Louisiana.

The judgment of the trial court (see Appendix to petition, p. 76 - 77) granting Petitioner's summary judgment motion was that the inheritance tax ordinances "are found by this Court to be violative of the Louisiana Constitution of 1974, illegal under our laws and jurisprudence and unenforcable in several of its applications." See also Reasons for the Rulings by the trial court judge (Appendix to petition, p. 78 -96) -- "this Court finds that the ordinance

to petition, p. 78 -96) -- "this Court finds that the ordinance imposing an inheritance tax is in direct violation of the 1974 Constitution of the State of Louisiana. . . ." (Appendix to petition, p. 96).

The opinion of the Louisiana Supreme Court clearly contains the requisite "plain statement" of reliance on state law which precludes a grant of certiorari.

Case law is limited as to a finding of an independent and adequate state law ground, as denials of certiorari generally are without opinion. However, a comparison of the instant case with those cases in which this Court has found the "plain statement" of state law grounds to be inadequate leaves little doubt that, in this case, state law does provide an adequate and independent basis for the decision.

Most recently, this court has stated: "The state court mentioned the state constitution several times in its opinion but otherwise relied exclusively on federal law . . . . Its discussion focuses solely on the federal statute." *Asarco Inc. v. Kadish*, ____ U.S. ____, 109 S.Ct. 2037, 2049 (1989). See also *New York v. Class*, 475 U.S. 106, 109-10 (1986) ("The Opinion of the New York Court of Appeal mentions the New York Constitution but once and then only in direct conjunction with the United States Constitution."); *Michigan v. Long supra*, 463 U.S. at 1037 (1983) ("The Court below referred twice to the State Constitution in its opinion, but otherwise relied exclusively on federal law.")

It is clear beyond peradventure that the instant case stands in marked contrast to those cited above.

While the Louisiana Supreme Court's opinion cites various federal cases (often for such general principles as "the power to tax is the power to destroy", *McCulloch v. Maryland*, 17 U.S. 316 (1819) (Opinion, Appendix to petition, p. 15)) and refers on occasion to the United States Constitution, the issues considered by the Court relate overwhelmingly to state law concerns such as the City's taxing power under Louisiana Law (Opinion, Appendix to petition p. 11 - 14), alleged violations of the Louisiana Constitution (Opinion, Appendix to petition, p. 14 - 23), preemption under state law (Opinion, Appendix to petition p. 27 - 32), the Civil Law concept of "seizin" (Opinion, Appendix to petition p. 32 - 34), the expiration date of the tax and various alleged procedural deficiencies, all under state law (Opinion, Appendix to petition, p. 34 - 39), and retroactivity (citing state law cases) (Opinion, appendix to petition, p. 39 -42). Only 4 pages of the 42 page opinion, as reprinted in the Appendix to the petition, address the issues of equal protection and due process under both the state and federal constitutions.

Even a casual reading of the opinion of the Louisiana Supreme Court leaves no doubt that this case is inherently and explicitly based on state law issues. The opinion is replete with references to state constitutional and codal provisions and citations to Louisiana state court cases. The Decree of the Louisiana Supreme Court (Opinion, Appendix to petition p. 42) reversed the trial court which, as set forth above, had held the inheritance tax in violation of the Louisiana Constitution and the laws of the state of Louisiana.

In short, it is "clear from the opinion itself that the state court relied upon an adequate and independent state grount" and that the state court did *not* rest "its decision primarily on federal law." *Michigan v. Long*, supra, 463 U.S. at 1042.

IV

THE JUDGMENT OF THE LOUISIANA SUPREME COURT WAS CORRECT

The City of course need not address in depth the merits of this case in this Opposition; however, a brief paragraph is in order.

The initial opinion of the Louisiana Supreme Court and its subsequent opinion denying rehearing are reprinted at pages 1-52 of the Appendix to the petition. In these opinions, the court considered at length the City's power under state law to levy an inheritance tax and Petitioner's assertion that the tax violated numerous provisions of the Louisiana Constitution. Inherently and peculiarly civil law concepts such as "seizin" are involved, as well as fundamentally non-federal issues such as the City's powers under its Home Rule Charter and under the Louisiana Constitution. There is no doubt that the Louisiana Supreme Court is the best and final arbiter of the meaning of state law. That court's ruling is, simply put, correct; there is no reason for this court to review that decision.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be denied.

Respectfully submitted

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